No. 14924

# In the United States Court of Appeals For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of DONALD LEROY DAULTON, Deceased, *Appellant,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Appellee.*

## APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, Circuit Judge

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## JURISDICTION

This is an action under the Federal Employers' Liability and Boiler Inspection Acts (45 U.S.C.A. § 51 et seq. and § 23 et seq.). The District Court had jurisdiction under 45 U.S.C.A. § 56.

This court has jurisdiction of this appeal under 28 U.S.C.A. § 1291.

## ANSWER TO APPELLANT'S "SUMMARY STATEMENT OF EVIDENCE AND PLAINTIFF'S THEORY FOR A RECOVERY"

Appellant has set out at pages four to six of her brief a statement of facts and concludes:

> "* * * *the jury could have found the defendant railroad liable*"

and

> "* * * *or the jury could have found that a proximate cause of deceased's death was the negligence of the defendant*"

To appellant's statement of facts, we wish to add that there was substantial evidence that the right front footboard of the engine was in no way defective (Tr. 125-126; 133-136; 138-140; 143-144; Exhs. 2 I through 2 N, inclusive), and that there was no custom or practice as to stopping a train when a brakeman disappears from the view of the engineman (Tr. 121, 123).

Appellee does not feel that there was substantial evidence of negligence on its part and appellee duly moved for a directed verdict on this ground (Tr. 146-147).

However, since the jury found for appellee (Tr. 21) it *did find* that there was no defect in the footboard

and *did find* there was no custom or practice of stopping a train when a brakeman disappears from view.

We believe that appellant had a fair trial on these disputed issues and that the lower court committed no error in the trial of this case.

## QUESTIONS PRESENTED

1. Did the court err in instructing the jury that contributory negligence should be considered by it in assessing damages?

2. Did the court err in limiting argument of appellant's counsel to the facts and refusing to allow appellant's counsel to instruct the jury as to the law?

3. May appellant claim error because appellee proved on trial that the footboard involved in the accident was taken off the engine the day following and stored until the time of trial, when:

(1) Appellant made no objection on this ground until her motion for a new trial and

(2) Appellee's counsel advised appellant's counsel of the true facts the day before the trial and again in his opening statement to the jury?

4. Did the trial judge prejudice appellant's case by advising the jury that he did not feel that a proffered

expert witness of appellant possessed particular qualifications to express an opinion on the stopping distance of appellee's train when that matter was not a disputed issue in the case and was established by other witnesses?

## SUMMARY OF ARGUMENT

### I.

**The court did not err in instructing the jury that contributory negligence of appellant's decedent would diminish the damages of appellant. There was substantial evidence of contributory negligence on the part of the decedent.**

### II.

**The court did not err in refusing to allow appellant's counsel to instruct the jury as to the law.**

**It is the province of the court, not counsel, to instruct the jury on the law.**

### III.

**Appellant was not misled or prejudiced by appellee's proof that appellant's pictures did not accurately represent the engine footboard at the time of the accident.**

**Appellee's counsel advised appellant's counsel of this fact at least the day before the trial and discussed the matter in his opening statement.**

**Appellant did not ask for a continuance or object on this ground until her motion for a new trial.**

## IV.

**The trial court did not prejudice appellant's case by commenting on the qualifications of Mr. Zimmerman to testify as to the stopping distance of the train.**

**There was other competent evidence of the stopping distance and no dispute on that question between the parties.**

## ARGUMENT

### I.

**The court did not err in instructing the jury that contributory negligence of appellant's decedent would diminish the damages of appellant. There was substantial evidence of contributory negligence on the part of the decedent.**

In appellant's brief on this point (Appellant's Br. 10-16) appellant contends that the court erred in instructing the jury on the subject of contributory negligence and asserts four separate grounds as follows:

(1) That the deceased was conclusively presumed to be using due care;

(2) That contributory negligence was outside the issues of the pretrial order;

(3) That the court failed to instruct that appellee had the duty of proving contributory negligence by a preponderance of the evidence; and

(4) That the court "told the jury that the deceased did not use ordinary care" (Appellants' Br. 13).

Only one of the above grounds is properly before this court, that is, No. (1), appellant's assertion that the deceased was conclusively presumed to be using due care.

Rule 51 of the Federal Rules of Civil Procedure provides:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.*" (Emphasis supplied.)

Appellant's objection to the court's instructions is as follows:

> "THE COURT: Any exceptions, gentlemen?
>
> "MR. BROBST: There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circum-

> stances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given." (Tr. 175)

This court has held that only the grounds of objection stated by counsel at the time of trial will be considered on appeal under Rule 51.

In *Woodworkers Tool Works vs. Byrne*, 191 F. 2d 667 (9 Cir., 1951), this court held (p. 676):

> "We are of the opinion that Woodworkers Tool Works may not take advantage of any error in the charge as to *res ipsa loquitur* to procure a reversal because it made no appropriate objection as required by Rule 51, F.R.C.P., 28 U.S.C.A. The appellant failed to state *distinctly* to the court below the matter in the charge to which it objected and the ground of its objection."

See, also Barron and Holtzoff, Federal Practice and Procedure, Volumn II, page 799, § 1104.

*There was substantial evidence of contributory negligence in this case.*

It is undisputed that the deceased was riding the right front footboard of the engine of a slow moving

freight train and that somehow he fell off the engine and met his death under the front trucks.

On these facts, if there was a jury question of negligence on the part of appellee, there was certainly a like jury question of contributory negligence on the part of appellant's decedent. There was evidence that appellant's decedent was not required to ride the front of the engine and the jury could have found that his presence there constituted contributory negligence or that somehow through decedent's own fault and through no fault of appellee he fell off the engine.

Appellant's witness Biwer testified that there was no necessity for appellant's decedent to be on the front footboard since the engineer had a block signal to indicate where to stop and the welders working on the track were 75 car lengths past the scene of the accident so that the presence of decedent on the front of the engine was unnecessary to warn the welders (Tr. 53).

Appellant's witness Williams testified that there was no need for appellant's decedent to ride the front footboard (Tr. 85-86).

Appellant's witness Warmack testified that sometimes brakemen do ride the front steps of an engine without any necessity therefor (Tr. 100).

It is undisputed that appellant's decedent was not directing the movement of the train (Engineer Shively, Tr. 124).

From the above evidence, it is clear that the jury could have found that appellant's decedent was riding on the front of the engine through his own choice and that he met his death through an accident for which he himself was wholly responsible.

It has been held in a case such as this that the only inference possible would be that of contributory negligence.

In the case of *Kansas City Southern Ry. Co. vs. Jones*, 276 U.S. 303, 72 L. Ed. 583, it appeared that a car inspector was found dead near the railroad tracks and there was no evidence as to how he met his death. Justice Holmes, speaking for the Supreme Court, reversed a plaintiff's verdict, saying:

> "Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself."

See, also, the recent case of *Schultz vs. Pennsylvania Railroad Co.*, ..... U.S. ..... (1956), 100 L. Ed. (Advance, p. 430), where it appeared that plaintiff's decedent was

working on some icy tugboats at night with insufficient lighting provided by the defendant, who was his employer. The decedent fell off a tugboat and drowned and there was no evidence as to how the accident happened. The district court directed a verdict for the defendant and the Court of Appeals for the Second Circuit affirmed (222 F. 2d 540). The Supreme Court reversed, saying that the question of negligence of the defendant would be for the jury but the court stated contributory negligence would also be for the jury saying (p. 432 of 100 L. Ed. Advance):

> "And reasonable men could also find from the discovery of Schultz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schultz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. *Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences.*"

Based upon the above authorities and the evidence in this case, it is clear that there was evidence from which the jury could have found contributory negligence and the lower court was not in error in instructing the jury on that subject.

As we pointed out above, appellant's reason stated to the trial court for objecting to the instructions on contributory negligence is the only one before this court although appellant's brief argues several other grounds. The other grounds asserted by appellant are also without merit.

As to appellant's assertion that contributory negligence was not made an issue in the pretrial order, the law is clear that in a case under the Federal Employers Liability Act contributory negligence is not a defense and need not be pleaded.

In the case of *Kansas City Southern Ry. Co. vs. Jones*, 241 U.S. 181, 60 L. Ed. 943, it appeared that the state courts of Louisiana had excluded evidence of contributory negligence in a Federal Employers Liability Act case for the reason that it was not pleaded as a defense in the defendant railroad's answer. The Supreme Court discussed Section 3 of the Act, providing that contributory negligence is no defense but may merely be used to diminish damages, and stated:

> "Manifestly, under this provision, a defendant carrier has the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee.
>
> "The state supreme court upheld the railway company's claim of right to show contributory negligence under its general denial; but the trial court emphatically denied this and positively excluded all

evidence to that end. As, under the Federal statute, contributory negligence is no bar to recovery, the plain purpose in offering the excluded evidence was to mitigate damages."

In *Gray vs. Pennsylvania R. Co.*, 71 F. Supp. 683 (S.D., N.Y., 1946) the court struck from a pleading the defense of contributory negligence in a Federal Employers Liability Act case, saying:

> "In its answer defendant specifically denies all the allegations of the complaint that plaintiff's injuries were caused solely by the negligence of defendant or its employees, etc. The allegations in these defenses that he was injured solely by reason of his own negligence and without any fault or negligence on the part of defendant or its employees are superfluous. *These facts can all be proved under the general denial, which puts in issue not only the question of defendant's negligence but also the question of plaintiff's contributory negligence.* * * *
>
> "Therefore, the second and third defenses are both superfluous and unnecessary, as well as insufficient in law, and must be stricken."

The above authorities clearly demonstrate that since contributory negligence is no defense in a Federal Employers Liability Act case, it need not be pleaded and is an issue under a general denial of negligence.

It further appears that since the court instructed the jury that contributory negligence is not a defense

but could only be used to reduce damages and since the jury found for appellee, the instructions on contributory negligence could not have prejudiced appellant's case. The court instructed the jury:

> "* * * Contributory negligence is not a defense in this case at all." (Tr. 172)

In the case of *Dow vs. United States Steel Corp.* 195 F. 2d 478 (3 Cir., 1952), which was a Jones act case, the court said:

> "In addition, it should be said, as defendant points out, that since the jury returned a verdict for the defendant, it necessarily did not get to the question of contributory negligence on the part of the plaintiff. The error, if one had existed, was harmless."

See also the case of *Tracy vs. Terminal R. Ass'n. of St. Louis*, 170 F. 2d 635 (8 Cir., 1948) where the court said (p. 640):

> "The jury having determined this issue in favor of defendant, then clearly the question of decedent's contributory negligence became immaterial, as did also any testimony going to the extent of decedent's injuries or the amount of damages recoverable."

It therefore appears that since the court instructed the jury that contributory negligence was not a defense

and since the jury found for appellee, it found that appellee was not negligent at all, and any error on the subject of contributory negligence could not have prejudiced appellant.

## II.

**The trial court did not err in refusing to allow appellant's counsel to instruct the jury as to the law.**

> "It is the function and duty of a trial court, when called upon by either of the parties, to instruct the jury as to the principles of law applicable to the case on trial, and it is the duty of the jury to observe and conform to such instruction. Counsel cannot be permitted, therefore, to argue to the jury against the court's instructions, nor to indulge in any line or argument or comment which would tend to induce them to disregard the instruction given for their guidance." 53 Am. Jur. 397, Trial § 492.

In the Oregon case of *Mason vs. Allen et al*, 183 Ore. 638, 195 P. 2d 717, the court said (pg. 644):

> "The practice of reading law to the jury by counsel—either from a book or a manuscript—is not one to be encouraged. *Lang vs. Camden Iron Works*, 77 Or. 137, 148, 146 P. 964. It must be conceded, however, that the law is the major premise of every jury argument and it is not always possible to keep the premise inarticulate. It is difficult to see how a lawyer could argue a criminal case to a jury without referring to the rules of pre-

sumption of innocence and reasonable doubt, or how, in arguing a negligence case such as this, a lawyer could refrain from mentioning the conduct of a reasonably prudent person. *But, aside from references to such elementary rules, about which there can be no difference of opinion, statements by counsel of their views of the law and predictions as to instructions that will be given by the court — save where the court has previously advised counsel on the subject—have no place in the argument. The trial judge has ample power to control the argument in this regard and should exercise it, for the jury, while exclusive judges of the facts, must look to the court, not to counsel, for guidance as to the law of the case,*" (Emphasis supplied.)

In the case of *Glendenning Motorways, Inc. vs. Anderson et al*, 213 F. 2d 432 (8 Cir. 1954) the court said:

"Counsel for plaintiff in the course of his closing argument read to the jury what were stated by him to be applicable statutes of the State of Wisconsin and he commented thereon giving his views as to their construction and meaning. *The practice, we think, is reprehensible and should not be tolerated. It is the function and duty of the trial court to instruct the jury as to the law and it is the duty of the jury to accept as the applicable law that given by the court and no other.* It is the duty and province of the jury to find and determine the facts, not the law. (Citing cases)" (Emphasis supplied.)

If appellant wished the jury to be given certain instructions, she had the privilege of requesting them pursuant to Rule 51 of the Federal Rules of Civil Procedure. *Appellant requested no instructions* and therefore cannot complain now that the court erred in refusing to allow her counsel to instruct the jury.

It is clear from the above authorities that the trial court committed no error in refusing to allow appellant's counsel to argue the law to the jury.

If counsel were permitted to predict instructions and state the law, it could only confuse the jury and unduly emphasize the points discussed. As Judge Fee said: (Tr. 114)

> "* * * I do not permit you to argue the law or to say that I am going to give an instruction, because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up and say that I am going to say just absolutely the contrary."

The trial court committed no error in this regard.

## III.

**Appellant was not misled or prejudiced by appellee's proof that appellant's pictures did not accurately represent the engine footboard at the time of the accident.**

**Appellee's counsel in his opening statement advised the jury that the proof would show that the footboard involved in the accident had been removed the next day and stored until the time of trial.**

> "* * * And because something happened, or something may have happened to the footboard—it may have been bumped or something like that—the board was removed the morning after the accident. It has been put aside in the storeroom until yesterday, when it was replaced on the locomotive." (Tr. 37)

The original pretrial order discloses that appellee did not waive identification of appellant's photographs (see original pretrial order, p. 4—notes at the side of appellant's exhibits A, B and C). Appellant waived identification of appellee's photographs which were exhibited to appellant's counsel *before trial.* No objection was made by appellant before or during the trial. Appellant was content to sit by and gamble on the outcome and should not now be allowed to complain because the gamble was lost, and this is especially true where *appellant made no objection during trial and*

*the trial judge made no ruling during the trial on this point.*

## IV.

**The trial court did not prejudice appellant's case by commenting on the qualifications of Mr. Zimmerman to testify as to the stopping distance of the train.**

The trial court's comments concerning the qualifications of proferred expert witness Zimmerman could not possibly have prejudiced appellant's case. The trial court did not comment on any disputed question but merely told the jury that he did not believe that Mr. Zimmerman had sufficient qualifications to give an opinion as to the stopping distance of trains and that the jury should take into consideration Mr. Zimmerman's experience in weighing his testimony (Tr. 78).

The entire record discloses that there was no dispute between the parties as to the distance within which the train could be stopped and that appellee did not make an issue of that question.

When it appeared that the stopping distance of the train would be relevant to the other issues, the trial court asked counsel to stipulate and agree as to how many feet a train like the one involved in the accident could be stopped (Tr. 43). Thereafter, appellant's wit-

ness, Biwer, testified without objection from appellee that the train could be stopped, "Oh, within 10 to 15 feet" (Tr. 51). The disputed witness, Zimmerman, testified "within a few feet, or almost immediately" and this answer was allowed to stand (Tr. 78). Witness Williams testified over objection "in between four to six feet" (Tr. 83) and witness Warmack testified without objection "six to eight feet" (Tr. 97).

Appellee produced no evidence to contradict these witnesses.

Any comment the trial court made as to one of the witnesses testifying on this limited and undisputed point could not have possibly prejudiced the appellant's case.

## CONCLUSION

It is respectfully submitted that the trial court did not err in instructing the jury on contributory negligence since there was substantial evidence thereof and contributory negligence was an issue in the case. Further, if the trial court did err on this subject, since the jury was told that contributory negligence was not a defense but would merely diminish damages, the defense verdict of the jury conclusively discloses a finding of no negligence on the part of appellee so that contributory negligence was not considered.

The court properly refused to permit appellant's counsel to instruct the jury as to the law since that is the function of the court.

Appellant was advised before the trial and in appellee's opening statement that the footboard was changed immediately after the accident and that her pictures did not disclose the true condition. Appellant made no point of this matter until after the adverse verdict and then for the first time raised the point in her motion for a new trial. Appellant was not prejudiced thereby.

The court's comment on the qualifications of a witness who testified cumulatively to an undisputed fact in the case could not under any circumstances have prejudiced appellee.

The trial court committed no error and must be affirmed.

Respectfully submitted,

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